BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

BETTY VANDENBERG, Appellant, v. BUTLER COUNTY BOARD OF EQUALIZATION, Appellee.	))))))))))	Case No. 09P 002 DECISION AND ORDER REVERSING THE DECISION OF THE BUTLER COUNTY BOARD OF EQUALIZATION

The above-captioned case was called for a hearing on the merits of an appeal by Betty Vandenberg ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Commission's Hearing Room on the sixth floor of the Nebraska State Office Building in the City of Lincoln, Lancaster County, Nebraska, on December 22, 2009, pursuant to an Order for Hearing and Notice of Hearing issued October 27, 2009. Commissioner Wickersham, Chairperson of the Commission was the presiding hearing officer. Commissioner Warnes was absent. Commissioner Wickersham as Chairperson designated Commissioners Wickersham, Salmon, and Hotz as a panel of the Commission to hear the appeal.

Betty Vandenberg was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Julie L. Reiter, County Attorney for Butler County, Nebraska, was present as legal counsel for the Butler County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits, and heard testimony.

The Commission is required to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. Neb. Rev. Stat. §77-5018 (Reissue 2009). The final decision and order of the Commission in this case is as follows.

I.
ISSUES

Whether the decision of the County Board determining that the subject property is unreasonable or arbitrary.

II.
FINDINGS OF FACT

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The property to which this appeal pertains is a pump and associated equipment ("the Subject Property").
3. The County Assessor determined that the subject property was personal property and included it on the Taxpayer's list of taxable tangible personal property for the year 2009
4. The Taxpayer protested to the County Board.
5. The County Board upheld the County Assessor's listing of the subject property as taxable tangible personal property
6. An appeal of the County Board's decision was filed with the Commission.
7. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.

8. An Order for Hearing and Notice of Hearing issued on October 27, 2009, set a hearing of the appeal for December 22, 2009, at 2:00 p.m. CST.

9. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.

10. The subject property is a fixture taxable as real property.

III.
APPLICABLE LAW

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (Reissue 2009).

2. Personal property is defined as all property other than real property and franchises. Neb. Rev. Stat. §77-104 (Reissue 2009).

3. The term tangible personal property includes all personal property possessing a physical existence, excluding money. The term tangible personal property also includes trade fixtures, which means machinery and equipment, regardless of the degree of attachment to real property, used directly in commercial, manufacturing, or processing activities conducted on real property, regardless of whether the real property is owned or leased, and all property used in the generation of electricity using wind as the fuel source, including, but not limited to, that listed in subsection (9) of section 77-202. The term intangible personal property includes all other personal property, including money. Neb. Rev. Stat. §77-105 (Cum. Supp. 2008).

4. Real property is defined as "(1) All land; (2) All buildings, improvements, and fixtures, except trade fixtures; (3) Mobile homes, cabin trailers, and similar property, not

registered for highway use, which are used, or designed to be used, for residential, office, commercial, agricultural, or other similar purposes, but not including mobile homes, cabin trailers, and similar property when unoccupied and held for sale by persons engaged in the business of selling such property when such property is at the location of the business; (4) Mines, minerals, quarries, mineral springs and wells, oil and gas wells, overriding royalty interests, and production payments with respect to oil or gas leases; and (5) All privileges pertaining to real property described in subdivisions (1) through (4) of this section.) Neb. Rev. Stat §77-103 (Reissue 2009).

5. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization, 266 Neb.* 297, 64 N.W.2d 445 (2003).

6. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).

7. The presumption disappears if there is competent evidence to the contrary. Id.

8. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006).

9. Proof that the order, decision, determination, or action appealed from was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).

10. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower,* 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).

11. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).

12. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.,* 258 Neb 390, 603 N.W.2d 447 (1999).

IV.
ANALYSIS

The Taxpayer owns a parcel of land with an irrigation well, pump, motor for the pump, a gear box attaching the motor to the pump, pipe to carry water from the pump to a center pivot, and the center pivot used to irrigate the parcel. The subject property is the pump. The County Assessor determined that the pump was taxable as personal property.

The pump hangs inside a cased well and is secured to the land with a cement cap and bolts. In *Cook v. Beermann,* 201 Neb. 447, 271 N.W.2d 459 (1978) modified 202 Neb. 447 276 N.W.2d 84 (1979), the Court determined that an irrigation pump in a well was a fixture included

in the sale of the land. The subject property, like the irrigation pump in the *Cook* case is a fixture.

However, not all fixtures are real property for purposes of taxation. The statutory definition of real property includes fixtures but excepts "trade fixtures." Neb. Rev. Stat. §77-103 (Reissue 2003). "Trade fixtures" are "machinery and equipment, regardless of the degree of attachment to real property, used directly in commercial, manufacturing, or processing activities conducted on real property, regardless of whether the real property is owned or leased." Neb. Rev. Stat. §77-105 (Reissue 2009). "Trade fixtures" are personal property. Neb. Rev. Stat. §77-105 (Reissue 2009). As defined in Section 77-105 of Nebraska Statutes "trade fixtures" have three characteristics 1) they are machinery and/or equipment; 2) they are used directly in commercial, manufacturing, or processing activities on real property; and 3) they may or may not be attached to real property.

In any attempt to determine whether an item is a "trade fixture" a determination must be made that it is machinery or equipment. The Commission has not found a definition for either term in statute or rules and regulations of the Tax Commissioner or Property Tax Administrator that pertains to the classification of items for property taxation. Machinery can be defined as "a functional unit of the means and appliances by which a desired result is obtained." *Webster's Third New International Dictionary*, Merriam-Webster, Inc., p. 1354 (2002). A machine is defined as "an assemblage of parts that are usu. Solid bodies but include in some cases fluid bodies or electricity in conductors and that transmit forces, motion and energy one to the another in some predetermined manner and to some desired end. An instrument or a lever designed to transmit or modify the application of power, force or motion." Supra p. 1353. Equipment can be

defined as “the physical resources serving to equip a person or thing (1): the implements (as machinery or tools) used in an operation or activity (2): all of the fixed assets other than land and buildings of a business enterprise.” Id.

The second definition of equipment would include all fixtures. The Legislature did not classify all fixtures as tangible personal property. The Property Tax Administrator testified that the language defining trade fixtures in LB 627 that was later incorporated into LB 334 conformed to administrative practice for incentive program exempt property determinations, and assessment of ethanol plants. The Property Tax Administrator also testified that the language in the bill also codified the legal concept of trade fixtures. Transcript of Revenue Committee hearing March 8, 2007 LB 627. The rules and regulations of the Property Tax Administrator in effect at the time of her testimony required consideration of the three part test stated in Northern Natural to determine if an item was a fixture. See, 350 Neb. Admin. Code ch 10 §001.01a (01/03/07). Trade fixtures were property of a tenant. See, *Bishop Buffets, Inc., v. Westroads, Inc.*, 202 Neb. 171, 274 N.W.2d 530 (1979).

As now defined in statute, only those fixtures which are machinery and equipment used directly in commercial, manufacturing, or processing activities may be trade fixtures and deemed tangible personal property. Neb. Rev. Stat. §77-105 (Reissue 2009). The second definition of equipment, all fixed assets other than land and buildings, is broader than the meaning of equipment that can be derived from its context in Section 77-105 of Nebraska Statutes and will not be considered further. The first definition, implements used in an operation or activity, includes machinery or tools. Machinery has been defined. A tool may be defined as an "implement or object used in performing an operation or carrying on work of any kind...

something which serves as a means to an end: an instrument by which something is effected or accomplished." *Webster's Third New International Dictionary*, Merriam-Webster, Inc., p. 2408 (2002).

With the foregoing definitions in mind the Commission can now turn to a consideration of the first factor. Can the pump be considered machinery or equipment? The pump is used to lift water several hundreds of feet to the surface and then distribute it through pipe and a center pivot. The operation of the pump requires a motor. The pump easily fits within the definition of machinery. The second element is use of the machinery used directly in commercial, manufacturing, or processing activities. The word commercial may be defined in terms of an activity or an objective. As an activity commerce is or the exchange or buying and selling of commodities esp. on a large scale and involving transportation from place to place. See, *Webster's Third New International Dictionary*, Merriam-Webster, Inc., p. 456 (2002). As an objective commercial refers to the point of view of profit or having profit as a primary aim. Id. As an objective the word commercial would modify the terms manufacturing or processing activities and the phrase would be read to mean those manufacturing or processing activities engaged in for profit. A more sensible construction is that three categories of activity were to be considered commercial, manufacturing, and processing. Is using a pump to provide water for irrigation a commercial activity? Is irrigation the exchange or buying and selling of commodities esp. on a large scale and involving transportation from place to place? On the record before the Commission, the answer is no. Manufacturing may be defined as "to make (as raw material) into a product suitable for use the wood ... is manufactured into fine cabinetwork. *Webster's Third New International Dictionary*, Merriam-Webster, Inc., p. 1378 (2002). Lifting water for

irrigation is not manufacturing as defined. Processing means "to subject to a particular method, system or technique of preparation handling or other treatment designed to effect a particular result: put through a special process: . . . as to prepare for market, manufacture, or other commercial use by subjecting to some process." *Webster's Third New International Dictionary*, Merriam-Webster, Inc., p. 1808 (2002). Is using a pump to provide water for irrigation subjecting the water to a particular method, system or technique of preparation handling or other treatment designed to effect a particular result: put through a special process: as to prepare for market, manufacture, or other commercial use by subjecting to some process? On the record before the Commission, the answer is no. The pump is machinery but it is not used in a commercial, manufacturing or processing activity. The pump is not a trade fixture.

The pump is a fixture and not a trade fixture, the County Board's determination must be reversed.

V.
CONCLUSIONS OF LAW

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.
4. The Taxpayer has adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be vacated and reversed.

VI.
ORDER

IT IS ORDERED THAT:

1. The decision of the County Board determining that the subject property was personal property as of the assessment date, January 1, 2009, is vacated and reversed.
2. The subject property shall be removed from the Taxpayer's taxable tangible personal property tax list for the year 2009.
3. This decision, if no appeal is timely filed, shall be certified to the Butler County Treasurer, and the Butler County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2009).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2009.
7. This order is effective for purposes of appeal on July 14, 2010.

Signed and Sealed. July 14, 2010.

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Nancy J. Salmon, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (REISSUE 2009), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.

I concur in the result.

The analysis above considers two standards of review for review. One standard of review is stated as a presumption found in case law the other is found as stated in statute. I do not believe consideration of two standards of review are required by statute or case law.

The Commission is an administrative agency of state government. See, *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000). As an administrative agency of state government the Commission has only the powers and authority granted to it by statute. Id. The Commission is authorized by statute to review appeals from decisions of a county board of equalization, the Tax Commissioner, and the Department of Motor Vehicles. Neb. Rev. Stat. §77-5007 (Supp. 2007). In general the Commission may only grant relief on appeal if it is shown that the order, decision, determination, or action appealed from was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(8) (Cum. Supp. 2008).

The Commission is authorized to review decision of a County Board of Equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Supp. 2007). Review of County Board of Equalization decisions is not new in Nebraska law. As early as 1903 Nebraska Statutes provided for review of County Board assessment decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. Id. A standard of review stated as a presumption was adopted by Nebraska's Supreme Court. See, *State v. Savage*, 65 Neb. 714, 91 N.W. 716 (1902) (citing *Dixon Co. v. Halstead*, 23 Neb. 697, 37 N.W. 621

(1888) and *State v. County Board of Dodge Co.* 20 Neb. 595, 31 N.W. 117 (1887). The presumption was that the County Board had faithfully performed its official duties and had acted upon sufficient competent evidence to justify its actions. See, Id. In 1959 the legislature provided a statutory standard for review by the district courts of county board of equalization, assessment decisions. 1959 Neb Laws, LB 55, §3. The statutory standard of review required the District Court to affirm the decision of the county board of equalization unless the decision was arbitrary or unreasonable or the value as established was too low. Id. The statutory standard of review was codified in section 77-1511 of the Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). After adoption of the statutory standard of review Nebraska Courts have held that the provisions of section 77-5011 of the Nebraska Statutes created a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. See, e.g. *Ideal Basic Indus. V. Nucholls Cty. Bd. Of Equal*., 231 Neb. 297, 437 N.W.2d 501 (1989). The presumption stated by the Court was the presumption that had been found before the statute was enacted.

Many appeals of decisions made pursuant to section 77-1511 were decided without reference to the statutory standard of review applicable to the district courts review of a county board of equalization's decision. See, e.g. *Grainger Brothers Company v. County Board of Equalization of the County of Lancaster*, 180 Neb. 571, 144 N.W.2d 161 (1966). In *Hastings Building Co., v. Board of Equalization of Adams County*, 190 Neb. 63, 206 N.W.2d 338 (1973), the Nebraska Supreme Court acknowledged that two standards of review existed for reviews by the district court; one statutory requiring a finding that the decision reviewed was unreasonable or arbitrary, and another judicial requiring a finding that a presumption that the county board of

equalization faithfully performed its official duties and acted upon sufficient competent evidence was overcome. No attempt was made by the *Hastings* Court to reconcile the two standards of review that were applicable to the District Courts.

The Tax Equalization and Review Commission was created in 1995. 1995 Neb. Laws, LB 490 §153. Section 77-1511 of the Nebraska Statutes was made applicable to review of county board of equalization assessment decisions by the Commission. Id. In 2001 section 77-1511 of Nebraska Statutes was repealed. 2001 Neb. Laws, LB 465, §12. After repeal of section 77-1511 the standard for review to be applied by the Commission in most appeals was stated in section 77-5016 of the Nebraska Statutes. Section 77-5016(8) requires a finding that the decision being reviewed was unreasonable or arbitrary. *Brenner v. Banner County Board of Equalization*, 276 Neb. 275, 753 N.W.2d 802 (2008). The Supreme Court has stated that the presumption which arose from section 77-1511 is applicable to the decisions of the Commission. *Garvey Elevators, Inc. V. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.w.2d 518 (2001).

The possible results from application of the presumption as a standard of review and the statutory standard of review are: (1) the presumption is not overcome and the statutory standard is not overcome; (2) the presumption is overcome and the statutory standard is not overcome; (3) the presumption is not overcome and the statutory standard is overcome; (4) and finally the presumption is overcome and the statutory standard is overcome. The first possibility does not allow a grant of relief, neither standard of review has been met. The second possibility does not therefore allow a grant of relief even though the presumption is overcome because the statutory standard remains. See, *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The third possibility requires analysis. The presumption and the statutory standard of

review are different legal standards, and the statutory standard remains after the presumption has been overcome. See. Id. The burden of proof to overcome the presumption is competent evidence. Id. Clear and convincing evidence is required to show that a county board of equalization's decision was unreasonable or arbitrary. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002). Competent evidence that the county board of equalization failed to perform its duties or act upon sufficient competent evidence is not always evidence that the county board of equalization acted unreasonably or arbitrarily because the statutory standard of review remains even if the presumption is overcome. *City of York,* supra. Clear and convincing evidence that a county board of equalization's determination, action, order, or decision was unreasonable or arbitrary, as those terms have been defined, may however overcome the presumption that the county board of equalization faithfully discharged its duties and acted on sufficient competent evidence. In any event the statutory standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted.

Use of the presumption as a standard of review has been criticized. See, G. Michael Fenner, About Presumptions in Civil Cases, 17 Creighton L. Rev. 307 (1984). In the view of that author the presumption should be returned to its roots as a burden of proof. Id. Nebraska's Supreme Court acknowledged the difficulty of using two standards of review and classified the presumption in favor of the county board of equalization as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *See, Gordman Properties*

Company v. Board of Equalization of Hall County, 225 Neb. 169, 403 N.W.2d 366 (1987). Use of the *Gordman* analysis allows consideration of both the presumption and the statutory standard of review without the difficulties inherent in the application of two standards of review. It is within that framework that I have analyzed the evidence.

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Wm. R. Wickersham, Commissioner

Commissioner Hotz, concurring in the reversal.

I concur with the decision to reverse the determination of the county board of equalization. I agree the subject property, an irrigation pump, should be assessed and taxed as real property, not as personal property, because it is a fixture. I write separately to explain how I would reach this result.

The primary issue in this appeal is whether the irrigation pump is real property or personal property. Real property includes, in relevant part, all land, and all buildings, improvements, and fixtures, except trade fixtures. *Neb. Rev. Stat. Section 77-103* (Reissue 2009). Even though they are included within the definition of real property, the statutes provide no definition for fixtures. However, a fixture is "[p]ersonal property that is attached to land or a building and that is regarded as an irremovable part of the real property.... Historically, personal property becomes a fixture when it is physically fastened to or connected with the land or building and the fastening or connection was done to enhance the utility of the land or building." *Black's Law Dictionary, Ninth Edition*. On the other hand, personal property includes "all property other than real property and franchises." *Neb. Rev. Stat. Section 77-104* (Reissue 2009). And tangible personal property includes "all personal property possessing a physical existence...

[and] includes trade fixtures." *Neb. Rev. Stat. Section 77-105* (Reissue 2009). Under this statutory framework, a particular item cannot be both real property and personal property. It is either one or the other, but not both.

In determining whether an item is a fixture constituting real property, the Nebraska Supreme Court has employed a three-factor analysis**:** "(1) actual annexation to the realty, or something appurtenant thereto, (2) appropriation to the use or purpose of that part of the realty with which it is connected, and (3) the intention of the party making the annexation to make the article a permanent accession to the freehold." *Northern Natural Gas Co. v. State Board of Equalization & Assessment*, 232 Neb. 806, 817, 443 N.W.2d 249, 257 (1989). As to the weight of each of these factors, the Court has explained, "The third factor, the intention to make the article a permanent accession to the freehold, is generally regarded as the most important factor when determining whether an article is a fixture. The other two factors, annexation and appropriation to the use of the realty, have value primarily as evidence of such intention." *Northern Natural*, 232 Neb. at 817, 443 N.W.2d at 257. Regarding this third factor, intention, the Court has further explained, "[t]he intention of the party making the annexation can be inferred from the nature of the articles affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made." *Id.,* 232 Neb. at 818, 443 N.W.2d at 257.

What should not go unnoticed is that the three factor analysis is very fact-specific. Particularly, the intention of the owner of the item "to make the article a permanent accession to the freehold." *Northern Natural,* 232 Neb. at 817, 443 N.W.2d at 257. Therefore, applying the three factor analysis of *Northern Natural*, it cannot be assumed that the same kind of item would

in every case be determined to be a fixture, since the intention of the owner of the item to make it a permanent accession to the land may differ significantly from case to case.

Here is where I first differ with the reasoning of the Decision of this Commission. While I agree that *Cook v. Beermann*, 201 Neb. 675, 271 N.W.2d. 459 (1978) informs our decision, a reliance upon *Cook*, without any discussion of the analysis of the applicable three factors, is misguided. In *Cook*, the Court determined that an irrigation pump was a fixture. While *Cook* was decided prior to *Northern Natural*, it employed a common law three-part test, much the same as the three-factor analysis later employed by the Court in *Northern Natural*. As to the third test, intention, the Court, in *Cook*, stated, "[t]he third test, namely that of 'intention,' appears by the clear weight of modern authority to be the controlling consideration." 201 Neb. at 679, 271 N.W.2d at 462. After applying the three tests, the court concluded the irrigation pump was a fixture. Since the three factors of *Northern Natural* are fact-specific, a careful analysis of these factors is necessary in order to properly analyze and determine whether an item is a fixture.

In this appeal, the Taxpayer is the owner of both the land and the irrigation pump attached to that land. He installed the irrigation pump in a well on the land sometime prior to 2008 for the purpose of irrigating crops. When the pump was not performing properly in 2008, the Taxpayer had parts of the pump either repaired or replaced, at a cost exceeding $21,000 (E9:5) and then continued its use as before.

Applying the three factors of *Northern Natural*, I start with annexation: "the actual annexation to the realty, or something appurtenant thereto." *Northern Natural*, 232 Neb. at 817, 443 N.W.2d at 257. When analyzing the annexation of the item to the land, some courts have determined whether the removal of the item would cause damage to either the item or the land.

Id., 232 Neb. at 818, 443 N.W.2d at 257. In this appeal, testimony was received that the pump was actually removed from the well in 2008 in order to repair and replace parts of the pump. There was no evidence that the actual removal of the pump caused any damage to either the land or to the pump. This factor, if taken alone, would seem to indicate the pump should not be considered a fixture because its removal would not cause injury either to the land or to the pump itself.

I next consider the second factor, which analyzes "appropriation to the use or purpose of that part of the realty with which [the item] is connected." *Id.*, 232 Neb. at 819, 443 N.W.2d at 258. If the item "is a necessary or useful adjunct to the realty, then it may be said to have been appropriated to the use or purpose of the realty to which it was affixed. If the [item] is attached for a use which does not enhance the value of the land, it is generally deemed not to become a part of the land." *Id.*, 232 Neb. at 820, 443 N.W.2d at 258. Testimonial evidence was received that the only use of the pump was to irrigate the crops on the same land to which the pump was attached, and that such irrigation played a role in achieving greater crop yields. On this point, I would take notice of the *2008 Reports & Opinions for Butler County*, which indicate average dryland values at $1,693 per acre and average irrigated values at $2,053 per acre for agricultural land. The evidence suggests the attachment of the pump to the land was for a use which enhanced the value of the land. This factor would indicate the pump should be deemed a fixture.

It is necessary to turn to the third and "most important" factor, "the intention of the party making the annexation to make the article a permanent accession to the freehold," remembering that the other two factors, annexation and appropriation, "have value primarily as evidence of such intention." *Northern Natural*, 232 Neb. at 817, 443 N.W.2d at 257. The intention of the

owner of the item being connected to the land "can be inferred from the nature of the articles affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made." *Id.* 232 Neb. at 818, 443 N.W.2d at 257. The most telling evidence of the Taxpayer's intentions were her actions in 2008 to reconnect the pump to the land after removing it for repairs and replacements. Testimonial evidence was received that the nature of such an irrigation pump was that it could be pulled from the well and transferred to another location for use in connection with another parcel. It can reasonably be inferred from the Taxpayer's actions, particularly those actions in 2008, that it was her intention to continue to use the pump in connection with the same parcel on a permanent basis. The Taxpayer's intention -- the most important factor -- would lead me to the conclusion the irrigation pump is a fixture. In consideration of the three factors of *Northern Natural*, I would conclude that the irrigation pump is a fixture and should be assessed and taxed as real property. In my opinion, application of the three factors of *Northern Natural* resolves the issues for purposes of deciding this appeal.

I disagree with the reasoning of the Decision of this Commission that we must determine whether the pump is a trade fixture after first determining the pump is a fixture. The term "trade fixture" is a longstanding term at common law. Trade fixtures are "[r]emovable personal property that a tenant attaches to leased land for business purposes, such as a display counter." *Black's Law Dictionary, Seventh Edition*. "The doctrine of trade fixtures is limited in its application to situations in which a landlord and tenant relationship exists, and is not applicable in case[s] in which the owner of land attaches [a] fixture to realty." 35A AM. JUR. 2D *Fixtures* Section 34. Trade fixtures "are articles annexed to the realty by a tenant for the purpose of

carrying on trade, and are ordinarily removable by him during his term." *Frost v. Schinkel*, 121 Neb. 784, xxx, 238 N.W. 659, 666 (1931). "It is only when [items] are property of a tenant, and hence trade fixtures, that they become part of the real estate upon being affixed to the property." *Bishop Buffets, Inc., v. Westroads Inc.,* 202 Neb. 171, 180-181, 274 N.W.2d 530, 535 (1979).

In this appeal, the irrigation pump was attached to the land by the Taxpayer, who owned both the land and the pump. Neither the land nor the pump were leased. There was no tenant. As such, at common law, the pump, owned by the Taxpayer who connected the pump to land also owned by the Taxpayer, would not be a trade fixture. Under the three factors of *Northern Natural,* the pump is a fixture. Under the traditional common law analysis of trade fixtures, the pump would not be a trade fixture, because it is not owned and attached by a tenant.

Nonetheless, the Decision of this Commission, after concluding the pump is a fixture, states that, "not all fixtures are real property, for purposes of taxation," then discusses *Neb. Rev. Stat.* Section 77-105 in order to determine whether the irrigation pump is a trade fixture. Section 77-105 states, in relevant part, "[t]he term tangible personal property also includes trade fixtures, which means machinery and equipment, regardless of the degree of attachment to real property, used directly in commercial, manufacturing, or processing activities conducted on real property, regardless of whether the real property is owned or leased." The Decision of this Commission concludes the irrigation pump is not a trade fixture, because "it is not used in a commercial, manufacturing or processing activity," and is therefore a fixture to be taxed as real property after all.

It may be important to note that this definition of trade fixtures at Section 77-105 was first codified by the Nebraska Legislature in 2007. 2007 *Neb. Laws LB 334,* Section 14. What

may have prompted the conclusion that "not all fixtures are real property" is the language "regardless of whether the real property is owned or leased." However, read in the context of Section 77-103, Section 77-104, and the common law of fixtures and trade fixtures, this language appears to be ambiguous.

"For a court to inquire into a statute's legislative history, the statute in question must be open to construction. A statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous. A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes. *Agena v. Lancaster County Board of Equalization,* 276 Neb. 851, 861, 758 N.W.2d 363, 372 (2008)

Section 14 of LB 334 originated in LB 627. The bill proposed to add the term trade fixtures to the statutory meaning of tangible personal property, and would define the term trade fixtures. In the public hearing on LB 627, the introducer of the bill testified LB 627 would require that trade fixtures be treated as tangible personal property, not as real property. *Statement of Senator Merton Dierks, Revenue Committee Public Hearing on LB 627,* March 8, 2007, page 7. While reference was made to the language, "regardless of whether the real property is owned or leased," no explanation was given that this language would conflict with the common law of fixtures or trade fixtures. *Id.* The Property Tax Administrator also testified at the hearing on LB 627. She stated, "The purpose of this bill is to codify existing administrative practices regarding the classification of the items as real or as personal. This bill will place into property tax law the longstanding legal concept of trade fixtures. The language of the bill mirrors court decisions

regarding trade fixtures as personal property." *Statement of Cathy Lang, Revenue Committee Public Hearing on LB 627,* March 8, 2007, page 8.

The language defining trade fixtures from LB 627 was amended into LB 334, adopted by the Legislature, and codified in Section 77-105. Throughout the legislative debate on the bill, no specific mention was made of the meaning of the language "regardless of whether the real property is owned or leased."

Had the Legislature intended to turn trade fixture common law on its head, one would expect Senators to say so in the course of the debate on the legislation. Instead, nearly the opposite was said by the Property Tax Administrator when she testified the longstanding common law legal understanding of trade fixtures would be "placed into property tax law, ... mirror[ing] court decisions..." *Statement of Cathy Lang, Revenue Committee Public Hearing on LB 627,* March 8, 2007, page 8. It seems clear from the legislative history on LB 334 that the Legislature did not intend to disturb the common law on fixtures.

An application of other rules of statutory construction should help guide this decision. First, "when construing a statute, we must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it... we construe statutes relating to the same subject matter together to maintain a sensible and consistent scheme..." *Tracfone Wireless, Inc. v. Nebraska Public Service Commission,* 279 Neb. 426 (2010). The reasonable and sensible construction of Section 77-105, the related statutes, and longstanding common law on trade fixtures would appear to be that trade fixtures are tangible personal property that a tenant attaches to leased land for business purposes. In this

appeal no landlord and tenant relationship exists, and thus it would appear that Section 77-105 should not apply.

And also, "[i]n construing a statute, appellate courts are guided by the presumption that the Legislature intended a sensible rather than absurd result in enacting the statute." *Foster v. BryanLGH Med. Ctr. East,* 272 Neb. 918, 725 N.W.2d 839 (2007). To construe Section 77-105 as the Decision of this Commission does will ultimately lead to absurd conclusions in cases where it is determined that the property is a trade fixture (personal property) after first determining the property is a fixture (real property) under the three factor analysis of *Northern Natural.* I would have significant misgivings in engaging in that kind of reasoning.

Further, in a recent case involving the determination of whether an item was deemed to be real property, the Court utilized the three factor analysis of *Northern Natural* in order to determine whether an item was a fixture. *Copple Construction, L.L.C. v. Columbia National Insurance Company*, 279 Neb. 60 (2009). Not unlike this appeal, both the item attached to the land and the land had the same ownership. No landlord and tenant relationship was at issue. After concluding the item was a fixture, employing an analysis of the three factors of *Northern Natural*, the Court did not then ask the question whether the item was a trade fixture. It would appear the Court concluded, as I have in this appeal, that Section 77-105 was inapplicable.

Therefore, I would not construe the language of Section 77-105 to permit the possibility that once such an item is determined to be a fixture, employing the three factor analysis of *Northern Natural*, that the item could then be determined to be a trade fixture under Section 77-105.

Since the irrigation pump is a fixture under the three factors of *Northern Natural*, and since the pump was annexed to the real estate by the owner of the property, rather than by a tenant, the pump should be assessed and taxed as real property. I therefore concur in the decision to reverse the determination of the county board of equalization.

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Robert W. Hotz, Commissioner